Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STOP-N-GO, INC.,
Appellant,

v.

EDWARD BRADFIELD, ADMINISTRATOR OF THE ESTATE OF JANIS BRADFIELD, DECEASED,
Appellee.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether Ohio's Workers' Compensation Act (i.e., O.R.C. Section 4123.01, et seq., especially 4123.35 and 4123.74)) violates the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution, in that the Act irrationally discriminates between employers who violate the law and employers who comply with the law, and also irrationally discriminates between their respective employees, as set forth below:

(1) In situations where employees sustain injuries due to the intentional tort of their employers, the employers who comply with the Act by paying the mandatory premiums into the State Workers' Compensation fund must provide a double recovery for the employee's single injury. That is, such employers must pay once to the fund and then pay a second time in the form of damages in a common law action, without set-off or other credit for either payments made to the fund or for workers' compensation benefits awarded to the employee. On the other hand, employers who violate the law by failing to pay the mandatory premiums into the State Workers' Compensation fund must only provide their employees a single recovery for such injury.

(2) In situations where employees sustain injuries due to the intentional tort of their employers, the employee of a complying employer obtains a double recovery for his single injury in that he may receive one award under the Workers' Compensation Act and an additional award via a common law action against his employer. On the other hand, the employee of a non-complying employer is limited to a single recovery for his single injury.

LIST OF ALL PARTIES

(1) Stop-N-Go, Inc. (also captioned as "Stop & Go"), Defendant-Appellant.

(2) Edward Bradfield, Administrator of the Estate of Janis Bradfield, Deceased, Plaintiff-Appellee.

28 U.S.C. 2403(b) may be applicable.

CORPORATE PARTY'S AFFILIATION

Appellant's actual name is Stop-N-Go Foods, Inc. Appellant is a wholly-owned subsidiary of Sun Company, Inc. Appellant has several wholly-owned subsidiaries.

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v.

EDWARD BRADFIELD, ADMINISTRATOR OF THE ESTATE OF JANIS BRADFIELD, DECEASED,

Appellee.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Ohio Supreme Court reversing and remanding the judgment of the Court of Appeals for Montgomery County, Ohio (App. A, infra, 1a-6a) is reported at 17 Ohio St. 3d 58, 17 O.B.R. 62 (1985). The opinion of the Court of Appeals for Montgomery County, Ohio, affirming the judgment of the Common Pleas Court of Montgomery County, Ohio

(App. B, infra, 7a-11a) is not reported. The opinion of the Common Pleas Court of Montgomery County, Ohio (App. C, infra, 12a-15a) is not reported.

JURISDICTION

The judgment of the Ohio Supreme Court rejecting Appellant's attack upon the constitutionality of the Worker's Compensation Act, was entered on April 3, 1985. A notice of appeal to this Court (App. E, infra, 27a) was filed in the Ohio Supreme Court on June 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Applicable provisions of the Ohio Workers' Compensation Act are lengthy and therefore are set forth in the appendix. The citations for the applicable provisions are as follows: Ohio Revised Code Sections 4123.35, 4123.74, 4123.75, and 4123.77.

STATEMENT OF THE CASE

1. This case involves the question of whether Ohio's Workers' Compensation Act, especially Ohio Revised

Code Sections 4123.35 and 4123.74, violates the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution.

2. The instant suit arose in 1983 when Appellee, Edward Bradfield, as Administrator of the Estate of Janis Bradfield, Deceased, filed suit in the Common Pleas Court of Montgomery County, Ohio. The suit asserted a wrongful death claim against Appellant, Stop-N-Go, Inc., who was the employer of Janis Bradfield at the time of death.

On May 29, 1982, the Decedent, Janis Bradfield, while on duty as a sales clerk at a Stop-N-Go Food Store, was stabbed by Roger Dale Powers, who was at the time perpetrating an armed robbery on the store. As a result of her injuries, Janis Bradfield died.

Subsequent to Janis Bradfield's death, a claim for worker's compensation was filed with the Industrial Commission of Ohio by Mary E. Bradfield, the deceased's mother, on behalf of herself, the deceased's father, Edward Bradfield, and the deceased's minor child. In that claim, Mrs. Bradfield stated under oath that the "Deceased received an injury while in the course of employment. . . ." On September 8, 1982, the Ohio Industrial Commission granted the application for worker's compensation death benefits and found that Janis Bradfield's death was the result of "an injury which was caused by external accidental means and sustained in the course of and arising out of employment." The award granted benfits to the deceased's parents and the deceased's minor child.

On February 14, 1983, Appellee, Edward Bradfield, as Administrator of the Estate of Janis Bradfield, filed this wrongful death action against Appellant Stop-

N-Go, Inc., alleging that Janis Bradfield's death was the proximate result of the Appellant's "intentional malicious failure to proved reasonable measures for the safety of decedent, . . . , in willful and wanton disregard of their [sic] duty to protect the health and safety of its employees." Appellant, Stop-N-Go, Inc., answered the complaint asserting various defenses, including the defense that the claim was barred under Ohio law. (See Ohio Revised Code Sections 4123.35 and 4123.74.)

Subsequently, Appellant moved for summary judgment asserting that, since Appellee had applied for and received worker's compensation benefits arising out of the death of Janis Bradfield, that Appellee was estopped from bringing a claim for damages for Appellant's allegedly willful tortious conduct, since the injuries to Ms. Bradfield could not be both accidental and sustained "in the course of and arising out of employment" and at the same time intentional and not arising out of Ms. Bradfield's course of employment. In support of its motion, Appellant cited several Ohio case authorities, including the decision of the Ohio Supreme Court in *Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 23 O. Op. 3d 504, 433 N.E. 2d 572 (1982), cert. den. 459 U.S. 857, 103 S.Ct. 127.

Appellee Bradfield, countered the motion for summary judgment with a memorandum arguing that worker's compensation benefits were not meant to be an exclusive remedy.

The Common Pleas Court of Montgomery County, Ohio sustained the motion for summary judgment and entered judgment in favor of Appellant on the basis

that Ohio Revised Code Section 4123.74, as interpreted by the Ohio Supreme Court in *Blankenship* v. *Cincinnati Milacron Chemicals, Inc., supra,* precluded double recovery: "Since the Ohio Supreme Court has found that an intentional tort by an employer is not injury received in the course of and arising out of employment . . . and to be a compensable injury the injury must be received in the course of and arise out of employment, . . . , the two types of injuries are mutually exclusive." (App. C, infra, 14a).

Appellee appealed the decision of the Common Pleas Court to the Montgomery County Court of Appeals. The Montgomery County Court of Appeals affirmed the decision of the Common Pleas Court on the ground that the filing of a worker's compensation claim and subsequent receipt of benefits pursuant to that claim acts as a bar to a further intentional tort action arising from the injury or illness against the employer. (App. B, infra, 10a). This action was subsequently certified to the Ohio Supreme Court for review.

After Appellee Edward Bradfield filed his brief in the Ohio Supreme Court, but before Appellant filed its brief, a divided Ohio Supreme Court rendered the decision in *Jones* v. *VIP Development Co.,* 15 Ohio St. 3d 90, 15 O.B.R. 246, 472 N.E. 2d 1046 (1984). In a surprising departure from the law announced in *Blankenship* v. *Cincinnati Milacron Chemicals, supra,* the *Jones* decision permitted an employee to obtain a double recovery for a single injury where the employee was injured by the intentional tort of his employer—one recovery in the form of an award of worker's compensation benefits and another recovery in the form of damages obtained in a common law

action against his employer. The *Jones* decision further noted that an employer who was held liable for an intentional tort was not entitled to a set-off equal to the amount of worker's compensation benefits received by the employee. Justice William B. Brown (who wrote the majority opinion for the Ohio Supreme Court in *Blankenship*), wrote a strong dissent in *Jones,* and pointed out that the *Jones* majority ignored the legal basis for the *Blankenship* decision:

> "The majority, in reaching its conclusion [in *Jones*], ignores [the] legal basis for the *Blankenship* decision. One act of an employer can not logically be within the scope of employment while at the same time not within the scope of employment. Nor can one act simultaneously be both a hazard of employment and not a hazard of employment. One act of an employer, under *Blankenship,* simply can not be both negligent and intentional. Hence, an injury may either be compensable under the workers' compensation system or be compensable at common law for an intentional tort. It cannot logically be compensable under both. . . ." *Jones* v. *VIP Development, supra,* at 102.

In light of the surprising result in *Jones* v. *VIP Development,* Appellant Stop-N-Go, Inc. was required, for the first time, to consider the constitutionality of the Ohio's Workers' Compensation Act. Thus, at its first available opportunity, Appellant Stop-N-Go attacked the constitutionality of Ohio's Workers' Compensation Act, as so recently interpreted by the Ohio Supreme Court, in Appellant's brief to the Ohio Supreme Court in this case. (Holdings of this Court indicate that Appellant herein has timely raised the

constitutional issues. E.g., *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74, 85-86 n.9, 100 S.Ct. 2035, 2043 n.9, 64 L.Ed. 2d 741, 755 n.9 (1980).)

In its brief to the Ohio Supreme Court, Appellant Stop-N-Go, Inc. asserted that Ohio's Workers' Compensation Act (to the extent it permits a double recovery for a single injury; requires complying employers to pay twice for such an injury while non-complying employers pay only once; and allows employees of complying employers to obtain a double recovery while employees of non-complying employers are limited to a single recovery) violates the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution, as well as Sections 1 and 16, Article I and Sections 26 and 35, Article II of the Ohio Constitution.

A majority of the Ohio Supreme Court below rejected Appellant's constitutional arguments without discussing them. Instead, the majority simply stated that the judgment of the Montgomery County Court of Appeals was reversed on the authority of *Jones* (App. A, infra, 1a). Justice Holmes, however, wrote a strong dissent (App. A, infra, 2a-6a) and opined that Ohio's Workers' Compensation Act, as interpreted by the majority, violated Sections 1 and 16, Article I and Sections 26 and 35, Article II of the Ohio Constitution. Although Justice Holmes did not, in his dissent, expressly refer to the Fourteenth Amendment, he did particularly emphasize the clear violations of equal protection principles:

> "This Court's decision in *Jones, supra,* results in treating one class of persons in a manner wholly inconsistent with rights granted to other classes."

THE QUESTION IS SUBSTANTIAL

The Ohio Supreme Court has upheld the constitutionality of a state law that clearly violates the federal due process and equal protection rights of both employers and employees. Contrary to the standards laid down in several holdings of this Court, the Ohio's Workers' Compensation Act, as interpreted by the Ohio Supreme Court, contains patently irrational and constitutionally invalid classifications that provide different treatment to persons who are virtually identically situated. The instant case involves classifications that are so patently irrational and constitutionally invalid that they practically defy the United States Constitution and challenge this Court to exercise its power to review and strike down infirm state laws. Under said circumstances, this Court should note probable jurisdiction.

1. In recent years, this Court, as well as the highest Courts of several states, has questioned under equal protection analysis the validity of classifications found in state workers' compensation laws. E.g., *Wengler* v. *Druggists Mut. Ins. Co.,* 446 U.S. 142, 100 S. Ct. 1540, 64 L.Ed. 2d 107 (1980); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972); *Nelson* v. *State, Dept. of Natural Resources,* 305 N.W. 2d 317 (Minn. Sup. Ct. 1981); *Ondler's Dependents* v. *Peace Officers Ben. Fund,* 289 N.W. 2d 486 (Minn. Sup. Ct. 1980); *Stevenson* v. *Industrial Commission,* 545 P.2d 712 (Col. Sup. Ct. 1976); *Caruso* v. *Aluminum Co. of America,* 15 Ohio St. 3d 306, 15 O.B.R. 436, 473 N.E. 2d 818 (1984); *Felske* v. *Daugherty,* 64 Ohio St. 2d 89, 18 O. Op. 3d 313, 413 N.E. 2d 809 (1980).

Most of the recent equal protection cases reviewed by this Court have involved classifications that affected suspect groups, fundamental rights, or which were gender or status based. While the instant case does not involve such classifications and thus would not require such "high" levels of scrutiny, the case does involve classifications that are totally unrelated to the furtherance of a legitimate state interest.

As this Court observed in *Vance* v. *Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979), as well as in other cases:

> "... in cases where [considerations of burdens upon a suspect group or fundamental interest] are absent, Courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. ... [W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Id., at 97.

Certainly, Ohio cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment of persons must bear some relevance to the object of the legislation. E.g., *Bullock* v. *Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 31 L.Ed. 2d 92 (1972).

2. Employer participation in Ohio's Workers' Compensation system is mandatory and employers must pay certain premiums into the state insurance fund. O.R.C. 4123.35. Employers who comply with the act and pay premiums into the fund are not liable to respond in damages at common law or by statute and thus, the exclusive remedy of employees of complying

employers for work related injuries (which do not constitute an "intentional tort" by the employer) is under the act. O.R.C. Section 4123.74. In the event that an employee's injury is due to the intentional tort of his complying employer, then under O.R.C. 4123.74 (according to the majority decision below and in *Jones* v. *VIP Development Co.*) the employee may receive workers' compensation benefits under the Act and also recover full damages from his employer, without set-off or other credit for either the amount of the premiums paid into the state fund by the employer or the amount of the workers' compensation benefits received by the employee.

As noted by the dissent of Justice Holmes in the Court below (as well as by the brief submitted by Appellant to the Ohio Supreme Court), the Ohio Workers' Compensation Act violates equal protection principles.

> "[Ohio's Workers' Compensation Act, as interpreted by the Ohio Supreme Court], results in treating one class of persons in a manner wholly inconsistent with rights granted to other classes. For example, an employee injured by the intentional tort of his complying employer might suffer an injury identical to that suffered by another employee injured by the intentional tort of his non-complying employer. According to [the Act, as interpreted by the Ohio Supreme Court], the employee of the complying employer can receive one award under the workers' compensation laws and an additional award via a common law action. However, the employee of the non-complying employer cannot. That is, under R.C. 4123.75 and 4123.77, if the employee recovers against his non-complying employer in a common law action, he must repay out of that judgment whatever amounts he

> received from the State Insurance Fund. There is no logical or legally valid reason for such a difference in the treatment of employees who suffer identical injuries. Similarly, there is no logical or legally valid reason for requiring the complying employer to pay twice for such an injury, while requiring the non-complying employer to pay only once. If anything, one would think that the non-complying employer, as a violator of the law, should be required to pay more than the complying employer. It is thus obvious that [the Act, as interpreted by the Ohio Supreme Court] creates a situation that encourages employers to simply stop paying into the fund and to become non-complying employers. This will frustrate the very purpose of the Act.
>
> Further, there is no logical or legally valid reason that a complying employer should have to pay twice for an intentional tort when *any* other tortfeasor, whether or not he is an employer, only has to pay once. This certainly cannot be the [Ohio Legislature's] intent when it enacted the workers' compensation statutes. If so, then those laws are undoubtedly unconstitutional." (App. A, infra, 4a-5a.)

There is simply no conceivable set of circumstances that would tend to establish some rational relationship to a legitimate state purpose, so as to justify treating violators of the law more favorably than obeyers of the law, or so as to treat employees of such violators less favorably than employees of such obeyers. This is especially so where "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT, JANUARY TERM 1985

Dissenting Opinion, per Holmes, J.

BRADFIELD, ADMR., APPELLANT, *v.* STOP-N-GO FOODS, INC., APPELLEE.

[Cite as Bradfield *v.* Stop-N-Go Foods, Inc. (1985), 17 Ohio St. 3d 58.]

Workers' compensation—Receipt of workers' compensation benefits does not preclude action against employer for common-law intentional tort.

(No. 84-1730—Decided April 3, 1985.)

CERTIFIED by the Court of Appeals for Montgomery County.

Herbert Creech and *Alvarene N. Owens,* for appellant.

Young, Pryor, Lynn & Jerardi and *Michael J. Burdge,* for appellee.

This cause, certified by the court of appeals (case No. 8709), is reversed on authority of *Jones* v. *VIP Development Co.* (1984), 15 Ohio St. 3d 90 .

CELEBREZZE, C.J., SWEENEY, C. BROWN and DOUGLAS, JJ., concur.

LOCHER, HOLMES and WRIGHT, JJ., dissent.

LOCHER, J., dissenting. I dissent because, as I noted in my dissent in *Jones* v. *VIP Development Co.* (1984), 15 Ohio St. 3d 90, 101-102, double recovery of workers' compensation and intentional tort benefits is untenable in law or logic. A viable alternative might be set off of claims if

a basis is presented, after recovery of workers' compensation benefits, for a genuinely intentional tort. Unfortunately the majority has refused to apply the definition of "intentional" in an analytically consistent manner and has rejected all alternatives, such as setoff, to reconcile this problem.

Accordingly, I dissent.

HOLMES, J., dissenting. This case presents a new low in decisional pronouncement of Ohio workers' compensation law and a new high in absurdity of result upon the facts, an absurdity born out of wedlock from the questionable law of *Blankenship* v. *Cincinnati Milacron Chemicals* (1982), 69 Ohio St. 2d 608 [23 O.O.3d 504], *Jones* v. *VIP Development Co.* (1984), 15 Ohio St. 3d 90, and their progeny. Here, a young lady clerk employed in a Stop-N-Go store was fatally stabbed during a robbery while she was on duty for her employer. Based upon this work-related death, the deceased's mother filed a claim for death benefits with the Industrial Commission. Such claim was allowed on the basis that the death was the result of "an injury which was caused by external accidental means or was accidental in character and result sustained in the course of and arising out of employment."

Thereafter, the decedent's father, as administrator of the estate, brought this wrongful death action against the employer on the basis that the death was the proximate result of the intentional act of the employer. The general thrust of such action was that Janice Bradfield, the employee, was fatally stabbed as a proximate result of the employer's "malicious failure to provide reasonable measures for safety of the decedent, a nineteen year old female, in wilful and wanton disregard of their [*sic*] duty to protect the health and safety of its employees."

First, as I stated in my dissents in *Blankenship, supra,* at 621, and *Jones, supra,* at 103, those decisions allowing

double recovery fly directly in the face of the Ohio Constitution. Such decisions violate Sections 26 and 35, Article II, and Sections 1 and 16, Article I, of the Ohio Constitution.

The significant and essential failing of the rationale of the majority holding in *Jones* is that it does not engage in any analysis of the provisions of the Ohio Constitution in order to determine whether its rationale is consistent with the Constitution. Section 35 of Article II clearly and unequivocally states that, whatever statutes may be enacted by the General Assembly in order to create a workers' compensation system, those statutes must provide that when compensation is given to an employee for injuries "occasioned in the course of such workmen's employment," "[s]uch compensation shall be in lieu of all other rights to compensation, or damages, for such * * * injuries * * * and any employer who pays the premium or compensation provided by law * * * shall not be liable to respond in damages at common law or by statute for such * * * injuries * * *." If Ohio's Workers' Compensation Act permits an employee to recover once under the Act, and again in a common-law action, for the same single injury, then that Act violates the clear provisions of Section 35, Article II of the Ohio Constitution. Certainly, no policy considerations, such as the fairness or unfairness of requiring an election of remedies, whether weighed and considered by a court or a legislature, can operate so as to emasculate the clear and express provisions of the Constitution.

Furthermore, allowing double recovery for a single injury results in a violation of Section 26, Article II, and Sections 1 and 16, Article I, of the Ohio Constitution. It was long ago noted that the sections of Ohio's workers' compensation law "are all parts of the same law. They are all enacted pursuant to the same constitutional authority and must be harmonized and so administered * * *

as not to create inequalities; so as not to create rights in favor of one class of persons wholly inconsistent with rights granted to others. * * * [To do otherwise] would raise a serious doubt as to its constitutionality, as not having uniform operation, and therefore in violation of section 26, Art. 2, of the Ohio Constitution." *State, ex rel. Crawford,* v. *Indus. Comm.* (1924), 110 Ohio St. 271, 280.

This court's decision in *Jones, supra,* results in treating one class of persons in a manner wholly inconsistent with rights granted to other classes. For example, an employee injured by the intentional tort of his complying employer might suffer an injury identical to that suffered by another employee injured by the intentional tort of his non-complying employer. According to *Jones,* the employee of the complying employer can receive one award under the workers' compensation laws and an additional award via a common-law action. However, the employee of the non-complying employer cannot. That is, under R.C. 4123.75 and 4123.77, if the employee recovers against his non-complying employer in a common-law action, he must repay out of that judgment whatever amounts he received from the State Insurance Fund. There is no logical or legally valid reason for such a difference in the treatment of employees who suffer identical injuries. Similarly, there is no logical or legally valid reason for requiring the complying employer to pay twice for such an injury, while requiring the non-complying employer to pay only once. If anything, one would think that the non-complying employer, as a violator of the law, should be required to pay more than the complying employer. It is thus obvious that the opinion in *Jones* creates a situation that encourages employers to simply stop paying into the fund and to become non-complying employers. This will frustrate the very purpose of the Act.

Further, there is no logical or legally valid reason that a complying employer should have to pay twice for an intentional tort, when *any* other tortfeasor, whether or not he is an employer, only has to pay once. This certainly cannot be the General Assembly's intention when it enacted the workers' compensation statutes. If so, then those laws are undoubtedly unconstitutional.

Justice William B. Brown, the author of *Blankenship, supra,* was in agreement with the aforestated position. In his dissent in *Jones,* he stated at 103:

"Even if I were to conclude that there are strong public policy considerations which militate against a finding that an employee, by receiving workers' compensation benefits, waives his right to institute a tort action when his employer's conduct amounts to an intentional tort, I would nonetheless be unable, pursuant to my oath of office, to so hold, for such a position is irreconcilable with the plain language of Section 35, Article II of the Ohio Constitution. * * *"

Here, the decedent's mother submitted a sworn statement to the Industrial Commission to the effect that the deceased was employed by Stop-N-Go at the time of the injury which resulted in her death, and that she was in the course of such employment at the time of the injury. Based upon such statements and a hearing thereon, benefits were paid. She could not have been an employee, and at the same time not have had such employee status.

Additionally, to show the absurdity of the reach of claimants in this area of tort law, one need only look at the facts of this case and the intentional tort claimed by the complainant. Here, the allegations of intentional tort, as elucidated in the record, involve the assertion that the injury and resulting death was fraudulently occasioned by the employer not having in fact maintained a closed circuit television camera on the premises. Accordingly, one

hypothesizes that the deceased employee and other employees were maliciously lulled into a false sense of security from harm by being told that the camera was a working television camera, when in fact it was a non-working mock-up of such a camera.

This utter nonsense clearly points to the horizon of counsel's imagination that will be perpetrated on the judicial system of this state, such cases leaning upon the crutch of *Blankenship* and *Jones*. Where will it end? What is next to be considered an "intentional" tort?

I would affirm the judgment of the court of appeals and, in so doing, reverse the legal aberrations foisted upon the public in *Blankenship* and *Jones*.

APPENDIX B

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

Case No. 8709

(C.P. #83-413)

EDWARD BRADFIELD
Plaintiff-Appellant

vs.

STOP-N-GO, INC.
Defendant-Appellee

• • • • • • • • •

OPINION

Rendered on the 21st day of September, 1984

• • • • • • • • •

ALVARENE N. OWENS, 1214 First National Plaza, Dayton, Ohio 45402
Attorney for Plaintiff-Appellant

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• • • • • • • • •

BROGAN, P.J

In the very early morning hours of May 29, 1982, Janice Bradfield, a nineteen year old clerk at a Stop-N-Go Food Store, was stabbed by Roger Dale Powers in the course of an armed robbery. As a result of her injuries, Janice died two hours later.

Subsequent to Ms. Bradfield's death, Mary E. Bradfield, the deceased's mother, filed a claim for workmen's compensation with the Industrial Commission of Ohio on behalf of herself, the deceased's father, Edward Bradfield and the deceased's minor child, Dion La Shaun.

In her claim, she stated "her daughter received an injury while in the course of her employment. . . ." On September 8, 1982, the District Hearing Officer of the Industrial Commission granted the application for death benefits and found that Janice Bradfield's death was the result of "an injury which was caused by external accidental means and sustained in the course and arising out of employment." The award granted benefits to the deceased parents and the deceased's minor child.

On February 14, 1983, Edward Bradfield, as administrator of the estate of Janice Bradfield, filed a wrongful death action in Montgomery County Common Pleas Court against appellee, Stop-N-Go Corporation, alleging that Janice Bradfield was fatally stabbed to death as a proximate result of the appellee's intentional, malicious failure to provide reasonable measures for the safety of the decedent in wilful and wanton disregard of their duty to their employees.

Stop-N-Go answered the complaint asserting the defense that the complaint failed to state a claim and that in the alternative the claim was barred under Ohio law.

On October 4, 1983, appellee moved for a summary judgment pursuant to Civ. R. 56 asserting that since plaintiff-appellant had applied and received workmen's compensation benefits arising out of Janice Bradfield's course of employment, they were estopped from bringing a claim for damages for appellee's wilful tortious conduct since they necessarily must not "arise out of Ms. Bradfield's course of employment." The appellee cited to the court the Ohio Supreme Court's decision in *Blankenship*

v. Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St. 2d 608. In support of its motion for summary judgment, appellee attached the affidavit of Chris Clark, custodian of the records of the Bureau of Workmen's Compensation Dayton Claim's Office. Those records indicated that workmen's compensation had been granted as stated heretofore.

Appellant countered the motion for summary judgment with a memorandum arguing that workmen's compensation benefits are not meant to be an exclusive remedy and in any event, appellant was entitled to seek damages for appellee's intentional concealment of the fact that appellee had installed a "fake" camera and concealed that fact from Janice Bradfield and other employees of the Stop-N-Go store and such concealment caused her injury and death. Appellant attached the affidavit of Ron Harris, a former employee of the Stop-N-Go Store where the murder occurred, who stated that he and other employees were told by Stop-N-Go management that a security camera was installed in the store, when in fact it was a "fake." He also stated Stop-N-Go management failed to inform him or other employers of other violent acts which had been perpetrated by Ms. Bradfield's assailant across the street four years previously. He stated he had been stabbed in 1982 and requested security measures be taken by Stop-N-Go but they ignored his suggestions.

The trial court granted summary judgment for appellee on the basis that appellant was estopped from asserting that Ms. Bradfield was intentionally injured by her employer when she and the deceased's other next of kin received benefits for an accidental claim occurring out of the "course of Ms. Bradfield's employment." The court cited *Blankenship v. Cincinnati Milacron Chemicals Inc., id.* as the basis for its ruling.

Appellant has appealed and asserted one assignment of error:

AN EMPLOYEE'S REMEDY UNDER THE WORKER'S COMPENSATION ACT IS NOT EXCLUSIVE AND THEY MAY RESORT TO A CIVIL ACTION IN TORT WHEN THEY HAVE BEEN INJURED BY AN EMPLOYER'S INTENTIONAL OR MALICIOUS TORT WHEN AN EMPLOYER ACTS IN A DUAL CAPACITY.

In *LeValley v. Glasco Plastics, Inc.* (May 3, 1984) Clark App. No. 1910, unreported, we held that a workers' compensation claim and subsequent receipt of benefits pursuant to that claim acts as a bar to a further intentional tort action arising from the injury or illness against the employer. In that opinion, we noted the Ohio Supreme Court in *Blankenship v. Cincinnati Milacron Chemicals, Inc., supra* stated in conclusion that "if the facts indicate the injury occurred in the course of and arising from employment, the workers' compensation remedy would be the exclusive remedy." *Id.* at 615. For a like result, see *Gains v. Webster Manufacturing Co.* (1983), 11 OBR 182; *Ritchie v. Dravco Corp.* (S.D. Ohio 1984), 11 OBR 181; *Pratt v. National Distillers & Chem.* (S.D. Ohio 1984); 11 OBR 185.

In *Hamlin v. Snow Metal Products* (Jan. 5, 1984) Cuyahoga App. No. 46229, unreported, the court held that an employer is not estopped nor precluded from seeking monetary damages merely because he has filed for and received workers' compensation benefits. (a motion to certify the record to the Supreme Court of Ohio was allowed on April 18, 1984 in Case No. 84-409). Also see *Walker v. Mid-States Terminal, Inc.* (March 3, 1984) Lucas App. No. L-83-278, unreported. In that case, the court held the employee's action against his employer for an intentional tort is not barred by the employee's acceptance of workers' compensation benefits for the reason that the remedies are not mutually exclusive as to the employee in that the injury arises in the course of the employee's employment but the employer's conduct is outside of the

course of employment. (a motion to certify the record is pending in the Ohio Supreme Court in Case No. 84-732).

In *O'Connor v. Midira* (1982), 55 N.Y. 2d 538, the Court of Appeals of New York held that a determination of the Workmen's Compensation Board that employee's injuries were accidental and occurred within the course of her employment was binding between the parties under the exclusive remedy and finality of Workmen's Compensation Law and was a bar to action by employee against her employer for damages based on intentional tort. The court held the principles of res judicata apply to administrative determinations when the agency is acting, as does the Workers' Compensation Board in a quasi-judicial capacity.

In summary, in accord with our previous decision in *LeValley* v. *Glasco Plastics, Inc., supra,* the assignment of error is overruled.

Our decision is in conflict with at least two other appellate districts. We would accordingly entertain a motion to certify this decision to the Supreme Court of Ohio for review. *See* Const., Art. IV, Sec. 3(B)(4); also R.C. 2505.072.

Judgment of the trial court is Affirmed.

• • • • • • • • •

KERNS, J. and WILSON, J., concur.

Copies mailed to:

Alvarene N. Owens
Michael J. Burdge
Hon. Russell E. Yeazel

APPENDIX C

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

Case No. 83-413
Yeazel

EDWARD BRADFIELD,
Plaintiff,

vs.

STOP & GO,
Defendant.

JUDGMENT ENTRY

YEAZEL, J.

This matter is before the court on defendant, Stop & Go Food, Inc.'s motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure.

I. FACTS

The facts of this case are essentially undisputed. On May 29, 1983 Janice M. Bradfield, while on duty as a clerk at Stop & Go Foods located at 3518 Brumbaugh Blvd. in Dayton, was stabbed by Roger Dale Powers while he was perpetrating an armed robbery on the store. As a result of her injuries, Janice Bradfield died.

Subsequent to Janice Bradfield's death, Mary E. Bradfield, the deceased's mother, filed a claim for Worker's Compensation with the Industrial Commission of Ohio. Mrs. Bradfield's claim was granted by the Commission on November 9, 1982. On February 14, 1983 Edward Bradfield, acting as administrator of the Estate of Janice

Bradfield, filed the present action against Stop & Go claiming that Janice Bradfield's death was the proximate result of defendant's "intentional malicious failure to provide reasonable means for the safety of decedent . . . in wilful and wanton disregard of their duty to protect the health and safety of its employees." (See plaintiff's complaint).

II. LAW AND ANALYSIS

Defendant's motion for summary judgment raises the issue of the plaintiff's ability to collect damages from the defendant in addition to those provided by the Ohio Workers' Compensation System. Ohio Workers' Compensation provides:

> "Employers who comply with section 4123.35,"—(pay into the workers compensation fund)—
>
> > "shall not be liable to respond in damages at common law or by statute for any injury . . . received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury . . . whether or not such injury . . . is compensable under sections 4123.01 to 4123.94" . . .

Ohio Revised Code section 4123.74.

The Ohio Supreme Court in interpreting this statute has stated that:

> ". . . since an employer's intentional conduct does not arise out of employment, R.C. 4123.74 does not bestow upon employers immunity from civil liability for their intentional torts and an employee may resort to a civil suit for damages."

Blankenship v. Cincinnati: Milacron Chemicals, Inc., 69 Ohio St. 2d 608, 613, 433 N.E. 2d 572 (1982). See also

Delamotte v. Unitcast Division of Midland Ross Corp., 64 Ohio App. 2d. 159, 411 N.E. 2d. 814 (Lucas County, 1978). The Supreme Court of Ohio followed *Delamotte* in reasoning that Ohio Revised Code section 4123.74 only covers injuries within the scope of employment. Id. at 612.

Since the Ohio Supreme Court has found that an intentional tort by an employer is not injury received in the course of and arising out of employment, *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d. 608, 433 N.E. 2. 575 (1982) and to be a compensable injury the injury must be received in the course of and arise out of employment, Ohio Revised Code section 4123.01(C), the two types of injuries are mutually exclusive. See generally *Hunter v. Citton Industries, Inc.*, No. 82CV-03-1608 (Common Pleas Court of Franklin County, 1983); *Varnes v. Willis Day Moving and Storage Co.*, No. CI 82-1949 (Common Pleas Court of Lucas County, 1983).

Following this reasoning, it is not possible for an injured employee to collect worker's compensation for injuries which result from an employer's intentional tort, and since the plaintiff filed for benefits under Workers Compensation, and received said benefits, he is essentially saying that his injuries were within the scope of his employment. The plaintiff should be prevented from turning around and saying that his injuries were intentionally caused by his employer.

This court finds that the plaintiff's contention that he was not the same person who filed for Workers' Compensation, and thus should not be barred from bringing a suit for Stop & Go's intentional tort is unfounded. The claim for Workers' Compensation was filed by the plaintiff's wife for the benefit of the deceased minor child. The plaintiff in the present action is acting as Administrator of the deceased's estate with the practical effect being acting for the benefit of the deceased's only living issue and heir.

In essence, the child who benefitted under the Workers' Compensation claim is also the only one who will benefit under the present action.

III. CONCLUSION

For the above reasons, the court finds that as a matter of law the defendant is entitled to judgment, and as such defendant's motion for summary judgment should be granted.

[Initial] Y.L.
Judge

ALVARENE OWENS;

PETER J. JERARDI, JR.

APPENDIX D

THE SUPREME COURT OF OHIO
COLUMBUS

1985 TERM

To wit: April 3, 1985

Case No. 84-1730

EDWARD BRADFIELD,
Appellant,
v.
STOP-N-GO, INC.,
Appellee.

JUDGMENT ENTRY

This cause, here on appeal from the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and cause remanded on authority of *Jones* v. *VIP Development Co.* (1984), 15 Ohio St. 3d 90.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court and that a mandate be sent to the Court of Common Pleas for entry.

/s/ FRANK D. CELEBREZZE
Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was cor-

rectly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date .....

JAMES WM. KELLY
Clerk

/s/ SAM T. ADKINS
Deputy

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 84-1730

EDWARD BRADFIELD
Plaintiff-Appellant

- VS -

STOP-N-GO, INC.
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed June 28, 1985, Supreme Court of Ohio
James Wm. Kelly, Clerk]

Notice is hereby given that Stop-N-Go, Inc. the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio entered in this action on April 3, 1985, which judgment reversed and remanded the judgment of the Court of Appeals for Montgomery County, Ohio.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ MICHAEL J. BURDGE
Michael J. Burdge
YOUNG, PRYOR, LYNN & JERARDI
1400 First National Plaza
Dayton, Ohio 45402
(513) 224-1981

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing instrument was forwarded by regular U.S. mail to Alvarene N. Owens, Attorney at Law, 1214 First National Plaza, Dayton, Ohio 45402 and Herbert Creech, Attorney at Law, 7211 Taylorsville Road, Dayton, Ohio 45424, this 28th day of June, 1985. All parties required to be served are thus served.

/s/ MICHAEL J. BURDGE
Michael J. Burdge

APPENDIX F

CONSTITUTION OF THE STATE OF OHIO

Article I: Bill of Rights

§ 1 Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety. (See Const 1802, Art VIII, § 1.)

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article II: Legislative

§ 26 What laws to have a uniform operation.

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

§ 35 Workmen's compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's em-

ployment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that

may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased to such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (As amended November 6, 1923. To take effect January 1, 1924.)

CHAPTER 4123: WORKERS' COMPENSATION

§ 4123.35 [Payments to insurance fund; self insurers; rules adopted.]

Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall semiannually in the months of January and July pay into the state insurance fund the amount of premium fixed by the industrial commission for the employment or occupation of such employer, the amount of which premium to be so paid by each such employer to be determined by the classifications, rules, and rates made and published by said commission. Such employer shall semiannually pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the commission, which receipt or certificate, attested by the seal of said commission, is prima-facie evidence of the payment of such premium.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor shall be liable for the unpaid premium due from any such subcontractor with respect to that part of the payroll of the subcontractor which is for work performed pursuant to the contract with such employer.

Provided, that as to all employers who were subscribers to the state insurance fund prior to January 1, 1914, or who may first become subscribers to said fund in any other month than January or July, the first paragraph of this section providing for the payment of such premiums semiannually do not apply, but such semiannual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. Provided, that such employers and publicly owned utilities who will abide by the rules of the commission and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such facts by the commission, be granted the privilege to pay individually such compensation, and furnish such medical, surgical, nursing, and hospital services and attention and funeral expenses directly to such injured employees or the dependents of such killed employees. The commission may charge employers or publicly owned utilities who apply for the privilege of paying compensation directly a reasonable application fee to cover the commission's costs in connection with processing and making a determination with respect to an application. The commission may require

such security or bond from said employers and publicly owned utilities as it deems proper, adequate, and sufficient to compel, or secure to such injured employees, or to the dependents of such employees as may killed, the payment of such compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance found in similar cases to injured employees or to dependents of killed employees whose employers contribute to said fund, except when an employee of such employer, who has suffered the loss of a hand, arm, foot, leg, or eye prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of said members as the result of any injury sustained in the course of and arising out of his employment, the compensation to be paid by such employer and publicly owned utility shall be limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the commission out of the surplus created by section 4123.34 of the Revised Code. Should municipal or other bonds be accepted by said commission as security for said payments, such bonds shall be deposited with the treasurer of state who shall have custody thereof and retain the same in his possession according to the conditions prescribed by the order of said commission accepting the same as security, and the treasurer of state shall retain possession of said bonds until such time as he is directed by said commission as to the manner of his disposition of the same. The commission shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission as to granting the privilege to such employees and publicly owned utilities, which rules shall be general in their application, one of which rules shall provide that all employers, including publicly owned utilities, granted the privilege to compensate directly their injured employees and the dependents of their killed employees, shall pay into the state insur-

ance fund such amounts as are required to be credited to the surplus in division (B) of section 4123.34 of the Revised Code. The commission also shall adopt rules; establishing a minimum level of performance as a criterion for granting the privilege to pay compensation directly; fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examinations and evaluations may not delay a decision on a claim; establishing the grounds upon which the commission will hold a public hearing to evaluate the program for self-insuring employers and set forth the procedures for revocation of self-insurer status which shall include continued failure to file medical reports bearing upon the injury of the claimant and failure to pay compensation or benefits in accordance with law in a timely manner. The commission may change or modify its findings of fact, or revoke the privilege of such employer or publicly owned utility to pay compensation direct, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of Chapter 4123. of the Revised Code, referring to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured employees and the dependants of killed employees.

The Commission shall adopt rules setting forth procedures for auditing the program of employers that are granted the privilege to pay compensation directly. Audits shall be conducted by the bureau of workers' compensation upon a random basis or whenever the bureau has grounds for believing that an employer is not in full compliance with commission rules or Chapter 4123. of the Revised Code. The bureau shall report its findings to the commission.

The administrator of the bureau of workers' compensation shall monitor the programs conducted by self-insuring employers, to ensure compliance with commission re-

quirements and for that purpose, shall develop and issue to employers who pay compensation directly standardized forms for use by the employer in all aspects of the employers' direct compensation program and for reporting of information to the bureau.

The bureau shall receive and transmit to the commission and to the employer all complaints concerning any employer engaged in paying compensation directly to employees. The commission shall maintain a file by employer of all complaints received that relate to the employer. The commission shall evaluate each complaint and take appropriate action.

The commission shall adopt as a rule a prohibition against any employer who is granted the privilege to pay compensation directly from harrassing, dismissing, or otherwise disciplining any employee making a complaint which rule shall provide for a financial penalty to be levied by the commission payable by the offending employer.

For the purpose of making determinations as to whether to grant self-insuring status to an employer or publicly owned utility, the commission may subscribe to and pay for a credit reporting service that offers financial and other business information about individual employers. The costs in connection with the commission's subscription or individual reports from the service about an applicant may be included in the application fee charged employers under this section.

*HISTORY: 139 v H 244. Eff 2-2-82.

§ 4123.74 Employer's liability in damages.

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational

disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his injured employees or the dependents of his killed employees, whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

HISTORY: GC § 1465-70; 109 v 72 (81), § 23; 118 v 422 (426), § 1; 128 v 743 (770), § 1 (Eff 11-2-59); 123 v 1334, § 1. Eff 11-2-59.

§ 4123.75 Remedy of employee against noncomplying employer.

Any employee whose employer has failed to comply with section 4123.35 of the Revised Code, who has been injured or has suffered an occupational disease in the course of his employment, which was not purposely self-inflicted, or his dependents in case death has ensued, may file his application with the industrial commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled tc receive if such employer had complied with section 4123.35 of the Revised Code. Payment of the claim shall be made promptly from the statutory surplus fund. Such payment shall not bar any action under section 4123.77 of the Revised Code. If a recovery is made in an action under section 4123.77 of the Revised Code any funds paid from the state insurance fund under this section shall be repaid by the claimant. The commission shall institute proceedings to recover from the employer any

moneys paid from the surplus fund and to secure the employer's payment of the award. The employer shall pay such award in the manner and amount fixed thereby or shall furnish to the commission a bond, in such an amount and with such sureties as the commission requires, to pay such employee such award in the manner and amount fixed thereby.

Appeals and payment in a contested claim are governed by the provisions of Chapter 4123. of the Revised Code that generally govern appeals to a regional board of review, the industrial commission, and the courts. In the event payments are made to a claimant which should not have been made under the final decision in the appeal of the claim, the amount of such payments shall be charged to the surplus fund created under division (B) of section 4123.34 of the Revised Code. In the event recovery is made from the non-complying employer, such sums as may be recovered shall be paid into the surplus fund.

If the employer fails to pay such compensation to the person entitled thereto, or fails to furnish such bond, within a period of ten days after notification of such award, the award shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state for the collection of such award. In such action it shall be sufficient for plaintiff to set forth a copy of the record of proceedings of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. A certified copy of such record of proceedings in such claim shall be attached to the complaint and consti-

tutes prima-facie evidence of the truth of the facts therein contained. Further proceedings shall be provided in the Rules of Civil Procedures. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order for trial. The cause of action provided in this section and the cause of action provided by section 4123.37 of the Revised Code may be joined in one action against an employer, and the amount of any premium paid or recovered from such employer for the period not exceeding six months during which such injury or disease, or injury or disease resulting in death, occurred shall be credited against the amount of any judgment for compensation recovered pursuant to this section. The amount recovered in such action from such employer shall be paid into the surplus fund created under division (B) of section 4123.34 of the Revised Code up to the amount paid out of the surplus fund and the balance into the state insurance fund. Any employee whose employer has elected to pay compensation to his injured employees or to the dependents of his killed employees in accordance with section 4123.35 of the Revised Code, in the event of the failure of his employer to pay such compensation or furnish such medical, surgical, nursing, and hospital services and attention or funeral expenses, may file his application with the commission for the purpose of having the amount of such compensation and such medical, surgical, nursing, and hospital services and attention or funeral expenses determined; and thereupon like proceedings shall be had before the commission and with like effect as provided in this section.

The commission shall adopt and publish rules governing the procedure before the commission provided in this section and shall prescribe the form of notices and the manner of serving the same in all claims for compensation arising under this section. Any suit, action, proceeding, or award brought or made against any employer

under this section may be compromised by the commission, or such suit, action, or proceeding may be prosecuted to final judgment as in the discretion of the commission may best subserve the interests of the state insurance fund.

A final judgment against the employer recovered in the manner provided in this section entitles such claimant to the compensation provided in Chapter 4123. of the Revised Code, for such injury, occupational disease, or death and such compensation shall be paid from the surplus created by section 4123.34 of the Revised Code, and any sum recovered on account of such judgment shall be paid to the commission and credited to such fund as the commission designates.

HISTORY: GC § 1405-74; 103 v 72(82), § 27; 111 v 222; 114 v 26; 132 v H 505 (Eff 11-21-67); 135 v H 417 (Eff 11-16-73); 136 v S 545, Eff 1-17-77.

§ 4123.77 Common law defenses denied to noncomplying employers. (GC § 1465-73)

Employers mentioned in division (B)(2) of section 4123.01 of the Revised Code, who fail to comply with section 4123.35 of the Revised Code are not entitled to the benefits of sections 4123.01 to 4123.94, inclusive, of the Revised Code, during the period of such noncompliance, but are liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect, or default of the employer, or any of the employer's officers, agents, or employees, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

CONSTITUTION OF THE UNITED STATES

Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 85-57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STOP-N-GO, INC.

Appellant,

v.

EDWARD BRADFIELD, ADMINISTRATOR OF THE ESTATE OF JANIS BRADFIELD, DECEASED,

Appellee,

On Appeal from the Supreme Court of the State of Ohio

MOTION TO DISMISS

HERBERT CREECH
7211 Taylorsville Road
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1-513-237-5522
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BEST AVAILABLE COPY

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69 OHIO STATE 2nd 608 (1982) 1

Jones v. VIP Development Co.,
15 OHIO STATE 3rd 90 (1984) 1

MOTION TO DISMISS

Comes now the appellee-Bradfield herein by and through counsel and moves the Court to dismiss the within appeal pursuant to Supreme Court Rule 16 in that:

1. No substantial federal question is presented, and,
2. The federal question attempted to be presented here was neither raised nor ruled upon properly in the Courts below, and,
3. The judgment rests upon an adequate and independent state law non-federal ground.

RESPECTFULLY SUBMITTED.

STATEMENT OF THE CASE AND FACTS

The outline of the case and the facts as found on appellee's jurisdictional statement in pages 2 through 6 thereof is essentially correct, but it is very important to note two especial matters with regard thereto: 1) the Ohio law which appellee wishes to challenge here on federal constitutional grounds applies only to the very limited class of torts which a plaintiff would be able to prove to the trier of facts in these cases were purely intentional on the part of the employer-defendant, and: 2) in neither the instant case nor the case of *Jones v. VIP Development Co.*, 15 Ohio State 3rd 90 (1984), did the Ohio Supreme Court depart from the rule announced in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio State 2nd 608 (1982), as argued by the appellee. In both of the later cases, the Supreme Court of Ohio merely amplified and clarified the public policy of the state regarding how its Worker's Compensation laws are to be interpreted so as to give greatest benefit to the working people of the state.

ARGUMENT

At page six of the jurisdictional statement, the appellee admits that the alleged federal constitutional issues were raised for the first time only in the Supreme Court of Ohio and were not discussed and argued as part of this case from the very beginning so as to have received full consideration by all lower courts which considered this matter. Accordingly, it appears at the outset that no federal constitutional issue has been timely raised for preservation for review by this Court, Supreme Court Rule 16(b).

In an attempt to show that there is a substantial federal question before this Court, the appellee mentions, and the appellant does not seriously deny, that many courts have analyzed state Worker's Compensation schemes at various times under the rubric of equal protection and due process standards accorded by the 14th Amendment. That is beside the point. (And on page nine of its jurisdictional statement, appellee even admits that no suspect groups, fundamental rights nor gender nor status questions are involved here.)

This case, and *Jones* as well as *Blankenship,* involve only the employers who are found guilty of an explicitly intentional tort. No other issue is at stake here. The arguments of appellee relative to complying versus non-complying employers is purely chimerical and totally specious. Violators of the law may always reap some imaginary benefit if they "get away with it." But here, there is no guarantee that they will "get away with it," and even if they do, it is certainly false to argue that the chances of a law-breaker avoiding a legal duty is sufficient reason to deny other deserving citizens more rights and more protections in intentional tort cases. But see, Ohio Revised Code 4123.77, at page 30a of appellee's jurisdictional

statement (which makes it clear that the non-complying law breakers in fact do not receive a greater benefit than employers who do comply with the law).

The corporate appellee here, in a feeble attempt to show that Ohio Supreme Court interpretations of its own state laws are irrational and serve no legitimate state purpose fails altogether to grasp the simple truth that the pronouncements in the *Jones* and *Blankenship* cases are final, definitive statements by the highest Court in the State of Ohio regarding the relationship between the state's own constitution and its statutes on Worker's Compensation.

In the case only of explicitly intentional torts, Ohio has simply chosen to give broad interpretation to its Worker's Compenstation laws in order to give deserving citizens a chance at full and adequate recovery for job-suffered catastrophes. This is in no sense a "double recovery" as the appellee suggests. It is an attempt to supplement the minimal entitlements of Worker's Compensation law with a judicially created additional remedy in the extremely narrow class of cases in which an employee can prove to the factfinder that he was the victim of an intentional tort at the hands of his employer - a desirable result which in no way offends the Constitution of the United States.

CONCLUSION

WHEREFORE, for the reasons stated in the motion and the arguments advanced herein, and also in that no substantial federal question is presented and further whereas the decision below rests on an adequate and independent ground of state law, the within appeal should be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served by ordinary U.S. mail this 23 August 1985 on opposing counsel herein, namely, Michael J. Burdge, 1400 First National Plaza, Dayton, Ohio 45402. All parties required to be served are thus served.

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